Public Prosecutor v Manager, MBf Building Services Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CRIMINAL REVISION NO 43-11 OF 1997
KC VOHRAH J
3 DECEMBER 1997

Constitutional Law *— Prosecution of offences — Absence of provision in the Environmental Quality Act 1974 providing for sanction or consent by Attorney General to institute proceedings for offences — Whether such omission rendered the Act unconstitutional and invalid — Whether there can be any institution of proceedings for an offence under the Act — Federal Constitution arts 4(1) & 145(3)*

The defendant was charged with two offences under the Environmental Quality Act 1974 ('the 1974 Act'). The defendant objected to the proceedings on a preliminary point that no prosecution can be had against the defendant because the 1974 Act does not contain a provision providing for a sanction by the Attorney General to institute proceedings for offences under the 1974 Act. It was argued that the defendant could not be prosecuted for the offences as the Director General of Environmental Quality has no power to institute such proceedings — there should be a provision in the 1974 Act for either the sanction or consent of the Attorney General to institute criminal proceedings, otherwise it would allow a person other than the Attorney General to institute such proceedings and that is unconstitutional. The sessions court had transmitted the record of proceedings to the High Court under s 30(1) of the Courts of Judicature Act 1964. The issue for determination was whether in the absence of a provision in the 1974 Act stating that no prosecution for any offence under the said Act can be instituted except with the sanction or consent of the Attorney General, there can be any institution of proceedings for an offence under the 1974 Act.

Held, declaring the 1974 Act valid:

All laws of the Federation will have to be read subject to the Federal Constitution; any law passed which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void (art 4(1)). It would be otiose to express art 145(3) of the Federal Constitution as a provision in the 1974 Act in relation to the offences created under the said Act since any provision in the Act which is inconsistent with it would in the first place be invalidated. Parliament may choose to require the exercise of the power vested in the Attorney General (the Public Prosecutor) under art 145(3) in respect of certain offences to be manifested either through his sanction or with his consent or through his written authorization before a court takes cognizance of the said offences; Parliament has chosen not to do so in respect of the 1974 Act. Therefore, the lack of a provision in the 1974 Act providing for a sanction by the Attorney General or his consent to institute

proceedings for offences under the Act does not invalidate the Act (see p 695F–I).

Obiter:

Whether the exercise of discretion by the Public Prosecutor in respect of the institution of a particular offence under a law is through a sanction, consent or written authority, the form is a matter of evidence which appraises the court that the Public Prosecutor has exercised his discretion before the court takes cognizance of the offence in accordance with what Parliament requires for that particular offence (see p 695E).

[Bahasa Malaysia summary

Defendan dipertuduhkan dengan dua kesalahan di bawah Akta Kualiti Alam Sekeliling 1974 ('Akta tahun 1974'). Defendan membantah terhadap prosiding atas hujah permulaan bahawa tiada pendakwaan boleh dijalankan terhadap defendan kerana Akta tahun 1974 tidak mengandungi satu peruntukan yang memperuntukkan sanksi oleh Peguam Negara untuk memulakan prosiding untuk kesalahan-kesalahan di bawah Akta tahun 1974. Ia dihujahkan bahawa defendan tidak boleh didakwa untuk kesalahan-kesalahan tersebut kerana Ketua Pengarah Alam Sekeliling tidak mempunyai kuasa untuk memulakan prosiding begitu — seharusnya terdapat satu peruntukan dalam Akta tahun 1974 untuk sama ada sanksi atau kebenaran Peguam Negara untuk memulakan prosiding jenayah, jika tidak ia akan membenarkan orang selain daripada Peguam Negara untuk memulakan prosiding demikian dan ini tidak mengikut perlembagaan. Mahkamah sesyen telah menghantar rekod prosiding kepada Mahkamah Tinggi di bawah s 30(1) Akta Mahkamah Kehakiman 1964. Isu untuk penentuan adalah sama ada dalam ketiadaan satu peruntukan dalam Akta tahun 1974 yang menyatakan bahawa tiada pendakwaan untuk mana-mana kesalahan di bawah Akta tersebut boleh dimulakan kecuali dengan sanksi atau kebenaran Peguam Negara, permulaan prosiding untuk satu kesalahan boleh wujud di bawah Akta tahun 1974.

Diputuskan, mengisytiharkan Akta tahun 1974 sah:

Segala undang-undang Persekutuan hendaklah dibaca tertakluk kepada Perlembagaan Persekutuan; sebarang undang-undang yang diluluskan yang berlawanan dengan Perlembagaan hendaklah terbatal setakat yang berlawanan itu (perkara 4(1)). Adalah lewah untuk menyatakan perkara 145(3) Perlembagaan Persekutuan sebagai satu peruntukan dalam Akta tahun 1974 berhubung dengan kesalahan-kesalahan yang diwujudkan di bawah Akta tersebut memandangkan apa-apa peruntukan dalam Akta tersebut yang berlawanan dengannya akan terlebih dahulu dijadikan tak sah. Parlimen boleh memilih untuk menghendaki pelaksanaan kuasa yang diletakhak dalam Peguam Negara (Pendakwa Raya) di bawah perkara 145(3) berkaitan dengan kesalahan tertentu ditunjukkan sama ada menerusi sanksi beliau atau

dengan kebenarannya atau melalui kebenaran secara bertulis sebelum sesebuah mahkamah boleh mengambil tahu tentang kesalahan-kesalahan tersebut; Parlimen telah memilih untuk tidak berbuat demikian berkaitan dengan Akta tahun 1974. Maka, kekurangan satu peruntukan dalam Akta tahun 1974 yang memperuntukkan sanksi oleh Peguam Negara atau kebenaran beliau untuk memulakan prosiding untuk kesalahan di bawah Akta tersebut tidak menjadikan Akta tersebut tak sah (lihat ms 695F–I).

Obiter:

Sama ada pelaksanaan budi bicara oleh Pendakwa Raya berkaitan dengan permulaan suatu kesalahan tertentu di bawah undang-undang adalah menerusi sanksi, kebenaran atau kebenaran secara bertulis, bentuknya adalah perkara bukti yang dinilaikan mahkamah bahawa Pendakwa Raya telah melaksanakan budi bicara beliau sebelum mahkamah mengambil tahu tentang kesalahan menurut apa yang dikehendaki oleh Parlimen untuk kesalahan tertentu itu (lihat ms 695E).]

Cases referred to

PP v Choy Kok Kuan & Ors [1959] MLJ 80 (refd)
PP v Datuk Harun bin Hj Idris & Ors [1976] 2 MLJ 116 (refd)
PP v Lim Shui Wang & Ors [1979] 1 MLJ 65 (refd)
Repco Holdings Bhd v PP [1997] 3 MLJ 681 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 30(1), (2), (3)
Criminal Procedure Code (FMS Cap 6) ss 129, 376(i), (iii), (iv)
Dangerous Drugs Act 1952 s 39B(3)
Environmental Quality Act 1974 ss 25(3), 37(1), (2)
Federal Constitution arts 4(1), 128(2), 145(3)
Internal Security Act 1960 s 80
Law Reform (Marriage and Divorce) Act 1976 s 43
Penal Code (FMS Cap 45)
Poisons Act 1952 s 34
Prevention of Corruption Act 1961 s 26
Securities Commission Act 1993 s 39
Securities Industry Act 1983 s 126(1)
Women and Girls Protection Act 1973 s 31

Stanley Augustin and *Hasila Awang* (Deputy Public Prosecutors) for the Public Prosecutor.

Teh Beng Boon (*Heng & Morgan*) for the defendant.

KC Vohrah J: The Sessions Court in Kuala Lumpur, a subordinate court, has transmitted the record of proceedings of a criminal matter before it to the High Court under s 30(1) of the Courts of Judicature Act 1964 ('the 1964 Act').

Subsection (2) of s 30 of the 1964 Act read with sub-s (3) and art 128(2) of the Federal Constitution empowers the High Court to examine the record and 'where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with s 48 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen'. In passing, I like to note that due to an oversight, s 48 mentioned in s 30(2) was not substituted when the 1964 Act was amended by Act A886; s 48 should in fact read as s 84.

The constitutional provision whose effect is under question is art 145(3) which provides that the 'Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court martial'.

The narrow constitutional question relates to the institution of proceedings for offences in the context of the Environmental Quality Act 1974 ('the 1974 Act'). It is necessary to sketch out the background of the case to see the context and the question.

The defendant in this case was charged with two offences under the 1974 Act; one, as I understand it, under s 25(3) for discharging liquid waste into inland waters, an offence punishable under s 25(3); the other under s 37(1) for failure to furnish information pursuant to a notice, an offence under s 37(2).

On 16 October 1997, counsel for the defendant, Mr Teh, objected to the proceedings on a preliminary point: that no prosecution can be had against the defendant because the 1974 Act does not contain a provision providing for a sanction by the Attorney General to institute proceedings for offences under the Act. As I understand him, his argument is that such a provision is required to be written into the Act so as to provide a nexus between the Act and the constitutional provision; that the defendant cannot therefore be prosecuted for the two offences as the Director General of Environmental Quality has no power to institute such proceedings.

Before me, Mr Teh elaborated on the same argument that there should be a provision in the 1974 Act for either the sanction or consent of the Attorney General to institute criminal proceedings, otherwise it would allow a person other than the Attorney General to institute such proceedings and that is unconstitutional.

The issue for determination is this: whether in the absence of a provision in the 1974 Act stating that no prosecution for any offence under the said Act can be instituted except with the sanction or consent of the Attorney General, there can be any institution of proceedings for an offence under the 1974 Act.

Before I go further, it has to be noted here that s 39 of the Securities Commission Act 1993 provides that prosecution in respect of offences committed under the Act or regulations made thereunder may be *conducted* by certain officers and no doubt for the interpretation of that provision,

resort may be held to the judgment given on 2 October 1997 in the case of *Repco Holdings Bhd v PP* Criminal Revision No W–43–7 of 1997; [1997] 3 MLJ 681. The court in that case relying on several authorities held, inter alia, that the Attorney General has the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings.

So as to put the office of the Attorney General in the correct perspective so far as criminal prosecutions are concerned, s 376 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') needs looking into. Section 376(i) provides that '[the] Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions under this Code.' In other words, the sanctioning authority is the Public Prosecutor and he is invested with the control and direction of criminal prosecutions. Powers are vested in the Public Prosecutor (exercisable by him personally, see 376(iv)) allowing him to appoint Deputy Public Prosecutors and these officers shall be under his general control and direction and they may exercise all rights and powers vested in and exercisable by him under the Code or any other written law except any right or power expressed to be exercisable by the Public Prosecutor personally (see s 376(iii)).

Turning to the meaning of 'institute' in the context of art 145(3), it is, as usual, illuminating to go back to the clarifying words of Abdoolcader J (as he then was) in *PP v Datuk Harun bin Hj Idris & Ors* [1976] 2 MLJ 116 at p 119 where he interpreted the significance of the words 'institute, conduct or discontinue.' In relation to the word 'institute', his Lordship stated:

> ... It ['Institute' in art 145(3)] must necessarily refer to the commencement of criminal proceedings and prosecutions ... . It may be ... that the Public Prosecutor has power ... to direct any case triable in the magistrate's or sessions court to be tried in the High Court after a preliminary enquiry. This power to so direct would, if exercised, fall squarely within his discretion to *institute* and *conduct* criminal prosecutions and proceedings.

This signification was approved by the Supreme Court in *PP v Lim Shui Wang & Ors* [1979] 1 MLJ 65 at p 67.

Parliament may require that the exercise of the power by the Public Prosecutor to institute proceedings be shown to a court before the court takes cognizance of an offence (see, eg the case of *PP v Choy Kok Kuan & Ors* [1959] MLJ 80). An example of the exercise of discretion vested in the Attorney General (the Public Prosecutor) is through a sanction by the Public Prosecutor. Abdoolcader J in the case of *Datuk Harun* at p 120 in relation to art 145(3), had this to say:

> The examples of discretion vested in the Public Prosecutor ... in relation to the issue and refusal of sanctions for prosecutions and the withdrawal of charges pertain to the institution and conduct of prosecutions and not to the regulation of criminal procedure.

For examples of sanctions by the Public Prosecutor, see s 129 of the CPC which sets out the provisions under the Penal Code (FMS Cap 45) which

require sanctions before a court can take cognizance of these offences. For an example outside the Penal Code, see s 34 of the Poisons Act 1952.

There are other examples of discretion vested in the Public Prosecutor expressed in other laws. A requirement for consent by the Public Prosecutor, as pointed out by En Teh, appears under s 126(1) of the Securities Industry Act 1983. The Public Prosecutor's consent is also required under s 80 of the Internal Security Act 1960, s 39B(3) of the Dangerous Drugs Act 1952 and s 26 of the Prevention of Corruption Act 1961. Another example, as pointed out by Deputy Public Prosecutor En Stanley Augustin, where consent by the Public Prosecutor is needed is s 31 of the Women and Girls Protection Act 1973. Sometimes there is a requirement for the written authority of the Public Prosecutor as manifestation of the exercise of discretion as appears in s 43 of the Law Reform (Marriage and Divorce) Act 1976.

I do not wish to go into a discussion as to the differences between a sanction, consent or written authority but suffice it to say that where there is a requirement for any one of these examples of the exercise of discretion by the Public Prosecutor expressed in a law for the institution of a particular offence, it has to be manifested to the court before the court of law can take cognizance of such offence brought before it.

Whether the exercise of discretion by the Public Prosecutor in respect of the institution of a particular offence under a law is through a sanction, consent or written authority, the form is a matter of evidence which appraises the court that the Public Prosecutor has exercised his discretion before the court takes cognizance of the offence in accordance with what Parliament requires for that particular offence.

All laws of the Federation will have to be read subject to the supreme law of the Federation, the Federal Constitution; any law passed which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void (see art 4(1)). It would be otiose to express art 145(3) of the Federal Constitution as a provision in the 1974 Act in relation to the offences created under the said Act since any provision in the Act which is inconsistent with it would in the first place be invalidated, as for example, vesting the power of instituting prosecution in offences under the Act, what is solely the power of the Attorney General (the Public Prosecutor), in the Minister charged with the responsibility for environmental protection or in the Director General of Environmental Quality. Parliament may choose to require the exercise of discretion vested in the Attorney General under art 145(3) in respect of certain offences and for such exercise to be manifested either through his sanction or with his consent or through his written authorization before a court takes cognizance of the said offences; Parliament has chosen not to do so in respect of the 1974 Act.

I therefore hold that the lack of a provision in the 1974 Act providing for a sanction by the Attorney General or his consent to institute proceedings for offences under the Act does not invalidate the Act.

In this case, DPP En Stanley has been commendably candid in bringing to the notice of the court that although there was a direction

made in 1994 by the Public Prosecutor that investigations relating to certain offences in certain laws including the two offences with which the defendant was charged in the sessions courts, as a matter of public interest, be referred to the Prosecution Division of the Attorney General's Chambers, this particular case by the Department which brought this case was not referred to that Division or to the Legal Advisor (concurrently a DPP) with the Ministry responsible for the Department. He concedes that the Public Prosecutor did not institute the criminal proceedings against the manager of MBf in respect of the two offences. This court's duty in this case is to determine the constitutional issue and no more and therefore it will be up to the Deputy Public Prosecutor to inform the sessions court the true situation in regard to the two charges and for the court to make all necessary orders.

Order accordingly.

Reported by Jafisah Jaafar